

RES JUDICATA AND FOREIGN COUNTRY JUDGMENTS

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The historical development of American law with respect to the treatment of foreign country judgments has already received the attention of several writers and therefore need not be repeated in detail here.¹ A brief review of the main currents of this development, however, will help to focus attention on the modern problems with which this article proposes to deal.

For the first half or three-quarters of a century after the founding of the Republic, courts in the United States contented themselves with regarding most foreign country adjudication as a rather ordinary species of evidence.² The basic principle, borrowed by the new states with considerable uniformity from the English cases,³ was that a foreign judgment could be received in later litigation in a new forum, but it was there to be treated only as *prima facie* evidence of the matters earlier adjudged.⁴ Under this rule the court to which a judgment was offered for enforcement or recognition was not precluded from a complete re-examination of the merits of the underlying cause of action.

Gradually, however, the content of this rule began to change, and the general direction of change was toward giving foreign adjudication a more conclusive effect. Several post-Revolution English cases were influential in this respect,⁵ but there were other causes as well.⁶ At any

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¹ Smit, "International Res Judicata and Collateral Estoppel in the United States," 9 U.C.L.A.L. Rev. 44, 48-56 (1962); Yntema, "The Enforcement of Foreign Judgments in Anglo-American Law," 33 Mich. L. Rev. 1129-1148 (1935).

² *Burnham v. Webster*, 4 Fed. Cas. 781 (No. 2179) (D. Me. 1846); *Buttrick v. Allen*, 8 Mass. 273, 5 Am. Dec. 105 (1811). Cf. *Cummings v. Banks*, 2 Barb. 602 (N.Y. Sup. Ct. 1848). See *Bimeler v. Dawson*, 10 Ill. (4 Scam.) 536, 539, 540 (1843) (dictum); *McKim v. Odom*, 12 Me. 94, 95 (1835) (dictum); *Draper's Ex'rs v. Gorman*, 35 Va. (8 Leigh) 628, 637 (1837) (dictum). But see *Boston India Rubber Factory v. Hoit*, 14 Vt. 92, 95, 96 (1842) (dictum). A few cases laid down the same rule for sister-state judgments before interpretation of the full faith and credit clause settled their conclusive effect. See, e.g., *Smith v. Lewis*, 3 Johns. R. 157, 3 Am. Dec. 469 (N.Y. Sup. Ct. 1808).

³ The leading English case appears to have been *Walker v. Witter*, 1 Doug. 1, 99 Eng. Rep. 1 (K.B. 1778) (opinion by Lord Mansfield). The earlier English view was that foreign judgments had to be recognized as a matter of international law. *Cottington's Case*, 2 Swanst. 326, 36 Eng. Rep. 640 (H.L. 1678).

⁴ See cases cited note 2 *supra*.

⁵ *Martin v. Nicolls*, 3 Sim. 458, 57 Eng. Rep. 1070 (Ch. 1830); *Henderson v. Henderson*, 11 Q.B. 1015, 116 Eng. Rep. 752 (1848).

⁶ A substantial number of the early American cases involved foreign admiralty de-

rate, the tendency toward greater conclusiveness was expressly recognized by many American courts before the end of the nineteenth century.⁷

The elevation of foreign judgments to a stature above that of *prima facie* evidence made it obvious that some method of limiting and defining their degree of conclusiveness was essential. Almost none of the states could be induced to accord to foreign judgments that same degree of conclusiveness required by the American constitution for sister state judgments.⁸ But if foreign judgments were to be entitled to less than full faith and credit, yet given more effect than other kinds of evidence, how were the limits of conclusiveness to be determined?

The American courts took two approaches to this problem. The first, a rather sensible one, was to start from the hypothesis that foreign judgments were conclusive, and then to list specific defenses which could be raised to defeat that conclusiveness.⁹ Such enumerated defenses included lack of jurisdiction in the foreign court, procurement of the foreign judgment by fraud, and clear mistake of fact or law in

crees, which were generally thought to be entitled to conclusive effect as a matter of international law. *Brown v. Union Ins. Co.*, 4 Am. Dec. 204 (Conn. 1810); *Cheriot v. Foussat*, 3 Binn. 220 (Pa. 1810); *cf. Jenkins v. Putnam*, 1 S.C.L. 8, 1 Am. Dec. 594 (S.C. Super. Ct. 1784). *But see Vandenheuvel v. United Ins. Co.*, 2 Johns. Cas. 451 (N.Y. Ct. Err. 1802). Judges apparently began to doubt the logic of giving conclusive effect to such decrees while the judgments of equally respectable foreign municipal courts were accorded less deference. *Bradstreet v. Neptune Ins. Co.*, 3 Fed. Cas. 1184 (No. 1793) (C.C.D. Mass. 1839); *Baker v. Palmer*, 83 Ill. 568, 572 (1876). Foreign judgments raised by a defendant in bar seem to have been given conclusive effect from the outset as an exception to the *prima facie* evidence rule, and the discriminatory effect of this distinction may have troubled some courts. *Baker v. Palmer*, *supra*; *Rapelje v. Emery*, 2 Dall. 231 (Pa. 1795). Curiously enough, the courts seem to have assumed for a very long time that a foreign judgment was conclusive if raised only collaterally. *Williams v. Preston*, 25 Ky. (3 J.J. Marsh.) 600, 20 Am. Dec. 179 (1830) (dictum); *MacDonald v. Grand Trunk Ry. Co.*, 71 N.H. 448, 52 Atl. 982 (1902); *Monroe v. Douglas*, 4 Sandf. Ch. 126 (N.Y. 1846), *aff'd*, 5 N.Y. 447 (1851); *Smith v. Lewis*, *supra* note 2 (dictum). *But cf. Bata v. Bata*, 163 A.2d 493, 506 (Del. 1960); *Smit*, *supra* note 1, at 69-74.

⁷ *Ritchie v. McMullen*, 159 U.S. 235 (1895); *Christian & Craft Grocery Co. v. Coleman*, 125 Ala. 158, 27 So. 786 (1900); *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 34 Atl. 714 (1895); *Baker v. Palmer*, *supra* note 6; *Thorn v. Salmonson*, 37 Kan. 441, 15 Pac. 588 (1887); *Jones v. Jamison*, 15 La. Ann. 35 (1860); *Lazier v. Westcott*, 26 N.Y. 146, 82 Am. Dec. 404 (1862); *Eastern Townships Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665 (1880).

⁸ *But see 2 Projet La. Prac. Code of 1825*, art. 746, at 118 (1936). This provision made sister-state and foreign judgments (other than default judgments) equivalent to domestic judgments even in the sense of being immediately executory. Although the provision for executory process appears to have been repealed in 1846, this was interpreted as not depriving foreign judgments of conclusive effect. *Jones v. Jamison*, *supra* note 7.

⁹ *Baker v. Palmer*, *supra* note 6; *Lazier v. Westcott*, *supra* note 7; *Banco Minerio v. Ross*, 106 Tex. 522, 172 S.W. 711 (1915); *Draper's Exr's v. Gorman*, *supra* note 2.

the rendition of the judgment.¹⁰ With a few important exceptions, however, implementation of this approach in the case law has never progressed much beyond this rudimentary formulation.

The essence of the alternative approach was to ignore the problem of definition. This was accomplished by shifting the emphasis away from the degree of effect to be given, and to put it instead on the problem of justification for giving any effect at all. The concept, ready at hand to serve this function, was the undefined and virtually undefinable principle of the comity of nations.¹¹ It was a doctrine of considerable antiquity, having already served somewhat the same purpose in relation to the older *prima facie* evidence rule.¹² Reliance upon it in written opinions thus assured an aura of respectability while at the same time permitting the judge to reach almost any result he wished. Its almost infinite capacity for expansion and contraction, and its corresponding weakness as a tool for the prediction of case results, is apparent on the face of its most often quoted "definition":

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹³

Thus conceived, as hanging somewhere between duty and courtesy, the doctrine of comity also left the status of foreign judgments in limbo between full faith and credit on the one hand and ordinary evidentiary effect on the other.

Had these two approaches remained distinct, the American law on this subject might have achieved a more rational development. But there is at least a certain plausibility in combining them, using comity

¹⁰ See notes 86-97 *infra*.

¹¹ For an excellent discussion of the comity doctrine in connection with foreign judgments see Ehrenzweig, *Conflict of Laws* 160-66 (1962). One of the obvious problems in defining comity is that it has been used rather loosely to mean quite different things. In the sense of its relevance here, it seems to have developed partly from the notion that domestic and foreign courts are co-ordinate; see an attempted definition of comity used in this sense in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900) (holding the federal circuit courts not bound to follow decisions of other circuits except on comity basis). The courts seem to have assumed without discussion that the highest court of one country is "co-ordinate" with the trial courts of another country. An early expression of doubt about the comity doctrine appears in *Walton v. Bethune*, 4 S.C.L. 453, 4 Am. Dec. 597 (S.C. Ct. App. 1811).

¹² 2 Kent, *Commentaries* *120.

¹³ *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

to justify the hypothesis of conclusiveness and using the enumeration of defenses as a brake upon conclusiveness. The product of this combination, however, was a leaky concept which permitted defenses to infiltrate at both ends. As the cases illustrate, a foreign judgment could be rejected simply on the ground that comity does not require recognition,¹⁴ without reference to any of the enumerated defenses. In this respect comity may be viewed as having introduced not only an extremely elastic public policy defense but also the requirement of reciprocity. The latter concept has been severely criticized and largely discredited,¹⁵ although its ghost still walks.¹⁶ As for the public policy defense, it remains the most unmanageable and least predictable of all objections raised to the recognition of foreign judgments. Since a rejection of conclusiveness could be made by attacking the rationale for the hypothesis of conclusiveness, there was little point in trying to clarify the scope of the particular defenses which had been enumerated. The result was to arrest the development of clear analysis. At any rate, this amalgam of comity and enumerated defenses did occur, and that mixture reflects with considerable accuracy the status of American case authority even today.¹⁷

Before turning to a closer consideration of the state of the law in the United States, it will be well to note a similar shift toward con-

¹⁴ See *Perdikouris v. The S.S. Olympos*, 185 F. Supp. 140 (E.D. Va. 1960); *Grey v. Independent Order of Foresters*, 196 S.W. 779 (Mo. App. 1917); *Fantony v. Fantony*, 21 N.J. 525, 122 A.2d 593 (1956); *Bittson v. Bittson*, 7 App. Div. 2d 868, 182 N.Y.S.2d 104 (1959); *Ex parte Dawson*, 3 Bradf. 130 (N.Y. Surr. Ct. 1855). Cf. *Ogden v. Ogden*, 159 Fla. 604, 33 So. 2d 870 (1948); *Clubb v. Clubb*, 402 Ill. 390, 84 N.E.2d 366 (1949); *In re Kohn's Estate*, 124 N.Y.S.2d 861 (Surr. Ct. 1953); *Perkins v. DeWitt*, 197 Misc. 369, 94 N.Y.S.2d 177 (Sup. Ct. 1950), *aff'd in part, rev'd in part*, 279 App. Div. 906, 111 N.Y.S.2d 752 (1952).

¹⁵ As introduced by *Hilton v. Guyot*, *supra* note 13, the reciprocity requirement was restricted to in personam judgments involving American nationals where the foreign proceedings were not initiated by the American party. But even on this limited basis, practically all writers have condemned the doctrine as neither useful nor wise. See *Smit*, *supra* note 1, at 49-50, and critics cited therein. Perhaps the strongest argument in favor of the reciprocity rule is made on the theory that it allows selective recognition and enforcement, and thus nonrecognition of judgments of countries with imperfectly developed judicial systems or with judicial officials suspected of partiality. Gutteridge, "Reciprocity in Regard to Foreign Judgments," 13 Brit. Yb. Int'l L. 49, 66 (1932).

¹⁶ *Gull v. Constam*, 105 F. Supp. 107 (D. Colo. 1952); N.H. Rev. Stat. Ann. ch. 524, § 11 (Supp. 1961).

¹⁷ See, e.g., *Applewhaite v. The S.S. Sunprincess*, 150 F. Supp. 827 (S.D.N.Y. 1956); *Iowa-Wisconsin Bridge Co. v. Phoenix Finance Corp.*, 41 Del. (2 Terry) 527, 25 A.2d 383 (1942) (dictum); *Application of Lang*, 9 App. Div. 2d 401, 193 N.Y.S.2d 763 (1959); *Dunstan v. Higgins*, 138 N.Y. 70, 33 N.E. 729 (1893); *Smith v. Smith*, 72 Ohio App. 203, 50 N.E.2d 889 (1943); *Martinez v. Gutierrez*, 66 S.W.2d 678 (Tex. Comm'n App. 1933). But see *Coulborn v. Joseph*, 195 Ga. 723, 25 S.E.2d 576 (1943) (res judicata theory).

clusiveness in the English law. This was chiefly accomplished by the formulation of the so-called obligation theory,¹⁸ which parallels the American use of the comity doctrine. The obligation theory predicates the enforcement of foreign judgments upon the acquisition of rights under the foreign legal system, or, for the local law theorist, predicates the creation of rights in the forum on whether or not such rights were created in the foreign system. Although this approach has much in common with the vested rights theory of conflicts still predominant in American case law, only a few courts in the United States seem to have adopted its terminology for the treatment of foreign judgments.¹⁹

TWO MISCONCEPTIONS

Two common misconceptions about foreign country judgments should be dispelled at the outset. The first of these is that cases involving such judgments "are extremely rare in this country."²⁰ Professor Nussbaum arrived at that conclusion principally from an examination of case digests covering the period from 1896 to 1936. By defining foreign divorce out of the picture (no reason given), as well as foreign probate (because this involves judicial administration rather than adjudication), he found only twenty-six cases involving foreign country judgments during this forty-year period.²¹ Subsequent writers have acquiesced in this evaluation of the frequency of the cases.²²

It must be conceded that the poor organization of the digests with respect to this subject matter makes exhaustive research difficult, and in any event "rarity" is a relative matter. Even so, it is clear that there are many more such cases than Professor Nussbaum's survey indicated. The present writer has found at least seventy-four reported American cases involving foreign adjudication during that same period, and this collection may not be complete. This total excluded all cases involving status or probate matters; if the latter are included, as they should be,²³

¹⁸ See generally Read, *Recognition and Enforcement of Foreign Judgments* (1938).

¹⁹ *Mellin v. Horlick*, 31 Fed. 865 (C.C.E.D. Wis. 1887); *Glass v. Blackwell*, 48 Ark. 50, 2 S.W. 257 (1886); *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926). Later cases in New York suggest that the courts there have returned to the terminology of comity. See, e.g., *International Firearms Co. v. Kingston Trust Co.*, 6 N.Y.2d 406, 160 N.E.2d 656 (1959); *Ross v. Ostrander*, 192 Misc. 140, 79 N.Y.S.2d 706 (Sup. Ct. 1948).

²⁰ Nussbaum, "Jurisdiction and Foreign Judgments," 41 Colum. L. Rev. 221, 237 (1941).

²¹ *Ibid.*

²² Smit, *supra* note 1; Reese, "The Status in This Country of Judgments Rendered Abroad," 50 Colum. L. Rev. 783 (1950); Ehrenzweig, *op. cit. supra* note 11, at 165.

²³ See notes 43-45 *infra*.

the total jumps to 130, or more than three reported cases per year for the forty years preceding 1936.

More to the point, however, is the fact that the number of foreign judgment cases since 1936 has grown substantially. Including all types, the present writer has found 288 such cases in the twenty-five year period 1937-1962, or a rate of more than eleven per year. Even excluding the staggering mass of Mexican divorce cases in the New York reports,²⁴ the annual rate of foreign country judgment cases has substantially more than doubled since the period of which Professor Nussbaum wrote.²⁵ Taking into consideration a suitable multiplier for unreported cases, it seems safe to conclude that the problems presented are far from purely academic.

The other misconception needing clarification is the notion that California is the only state with legislation on this subject, and that the effect to be given to foreign judgments in other states is therefore purely a matter of judge-made law.²⁶ It is true that California has a rather sweeping provision, but there are in addition numerous statutes in other states which bear either directly or indirectly upon the treatment of foreign adjudication. No complete catalog of these provisions can be undertaken here, but it will be useful to indicate at least the relevant types of statutes.

There are, first of all, statutes in many states which provide methods of authenticating and proving foreign judgments.²⁷ Few, if any, of these statutes attempt to measure the amount or quality of effect to be given to judgments proved under them; indeed, the New York statute expressly provides that nothing therein "is to be construed as declaring the effect of a record or other judicial proceeding of a

²⁴ The writer has found 102 reported cases in the New York courts involving Mexican divorces. Although the opinions are extremely repetitious, they are instructive both as to the variety of settings in which foreign status judgments may be raised and also as to the treatment given to foreign judgments rendered with jurisdiction over the parties but without jurisdiction of the subject matter. See note 134 *infra*.

²⁵ Excluding the Mexican divorce cases in the New York reports, the annual rate is now about seven cases. A fairly high percentage of these cases involve status problems; if status and probate matters are excluded, the rate has not increased appreciably over the 1896-1936 period.

²⁶ Nadelmann, "The United States of America and Agreements on Reciprocal Enforcement of Foreign Judgments," 1 *Neth. Int'l L. Rev.* 156, 159 (1953); Smit, *supra* note 1, at 48. Cf. Ehrenzweig, *op. cit. supra* note 11, at 165.

²⁷ Some of the proof statutes refer expressly to foreign country judgments; e.g., Iowa Code Ann. § 622.55 (1946); La. Civ. Code Ann. art. 2541 (West 1961); Vt. Stat. Ann. tit. 12, § 1698 (1958). Others are clearly broad enough to include such judgments as a matter of interpretation. Even where the statute specifically refers to other "states," it may furnish an analogue against which rules for foreign judgments can be judicially created. Cf. *Gautier Steel Co.*, 2 Pa. County Ct. 399, 400 (C.P. 1886).

foreign country.”²⁸ But even in the face of such a provision, and certainly in its absence, the permissible inference would seem to be that normally *some* effect will be given.

A second class of statutes deals more directly with the effect to be given to foreign adjudication. At one end of the spectrum is the famous California code provision which equates the effect of foreign judgments with that of California and sister-state judgments.²⁹ At the other extreme is a Maryland statute, dating from 1813, which denies conclusive evidentiary effect to any foreign judgment except as to the “acts or doings” of the foreign tribunal itself.³⁰ In between these poles lie a variety of diverse enactments. The statutes of California, Oregon and Montana give conclusive effect to foreign admiralty decrees.³¹ The Oregon and Montana provisions also require conclusive effect to be given to foreign adjudications of title.³² Maryland seems to do likewise, by specifically excepting from the restrictive provision already noted “the legal effects . . . on the property affected or intended to be affected thereby.”³³ The Oregon and Montana statutes give foreign in personam judgments the effect of a rebuttable presumption, but at the same time limit the matters which can be raised to rebut the presumption.³⁴ New Hampshire, in a recent statute, offers “faith and credit” to Canadian judgments on a strict reciprocity basis.³⁵ Delaware approves the rules of “international comity” for recognition of foreign divorce and annulment decrees, but without attempting to define comity.³⁶ Statutes of still other states deal with foreign decrees involving status and support,³⁷ the permissibility of attacks for lack of jurisdiction or notice,³⁸ and procedure to be followed when the foreign

²⁸ N.Y. Civ. Prac. Act § 397. This provision is omitted from the new New York Civil Practice Law and Rules § 4542, which goes into effect September 1, 1963, but inferences to be drawn from its omission are probably not important in view of the numerous New York cases on the subject.

²⁹ Cal. Civ. Proc. Code § 1915. On the background of this provision see Lorenzen, “The Enforcement of American Judgments Abroad,” 29 Yale L.J. 188, 204-205 (1919).

³⁰ Md. Ann. Code art. 35, § 39 (1957).

³¹ Cal. Civ. Proc. Code § 1914; Mont. Rev. Codes Ann. § 93-1001-24 (1947); Ore. Rev. Stat. § 43.200 (1961).

³² Mont. Rev. Codes Ann. § 93-1001-27 (1947); Ore. Rev. Stat. § 43.190 (1961).

³³ Md. Ann. Code art. 35, § 39 (1957).

³⁴ Mont. Rev. Codes Ann. § 93-1001-27 (1947); Ore. Rev. Stat. § 43.190 (1961). Both of these provisions limit the defenses to “. . . want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact.”

³⁵ N.H. Rev. Stat. ch. 524, § 11 (Supp. 1961).

³⁶ Del. Code Ann. tit. 13, § 1511 (1953).

³⁷ Colo. Rev. Stat. Ann. § 46-4-1 (1953). *But see* Minnear v. Minnear, 131 Colo. 313, 281 P.2d 517 (1955).

³⁸ N.J. Rev. Stat. § 2A:82-4 (1952).

judgment upon which a domestic judgment has been rendered is reversed or set aside.³⁹

A third class is composed of those statutes which are not expressly applicable to either foreign or sister-state judgments, but which may be applied to such judgments as a matter of judicial interpretation. The possibilities for statutory treatment of foreign judgments by this route are fairly numerous, since statutory definitions of "judgments," "res judicata" or "the effect of judgments" are not uncommon.⁴⁰ To the extent that they are not limited either expressly or by context to domestic application, all such provisions have a potential application to foreign judgments.⁴¹

Still another type of statute having an important although indirect effect on foreign adjudication consists of those provisions declaring the public policy of the state.⁴² As already noted, one of the recognized defenses to conclusiveness of a foreign judgment is that the underlying cause of action upon which it is founded contravenes the public policy of the recognition forum. Statutes which outlaw specific causes of action, therefore, are potential statutory defenses to foreign judgments founded on such causes.

A last group of statutes deserving mention consists of those concerned with foreign wills and foreign probate. These statutes are numerous and diverse;⁴³ no attempt will be made here to analyze or classify them. The present concern is merely to emphasize the necessity of including this category of cases in any comprehensive analysis of foreign judgments. While it may be true that in many instances proceedings in estate matters are administrative rather than adjudicative, it is equally clear that a contested foreign estate proceeding is adjudicative in the fullest sense of the word.⁴⁴ Even in the noncontested cases, at least those in which notice and opportunity to be heard are given,

³⁹ Ariz. Rules Civ. Proc. rule 60(d) (1956).

⁴⁰ See, e.g., La. Civ. Code Ann. arts. 2285, 2286 (1951).

⁴¹ See, e.g., Succession of Fitzgerald, 192 La. 726, 189 So. 116 (1939), construing the provisions cited in note 40 *supra*.

⁴² See, e.g., Ind. Ann. Stat. § 2-2905 (1933). This provision, aimed at outlawing cognovit notes and similar contracts, has more than an indirect effect since it refers specifically to foreign countries.

⁴³ See, e.g., Ariz. Rev. Stat. Ann. § 14-341 (1956); Colo. Rev. Stat. Ann. § 152-6-1 (1957); Uniform Probate of Foreign Wills Act § 1, 9B Uniform Laws Annotated 391 (1957). See generally Atkinson, "The Uniform Ancillary Administration and Probate Acts," 67 Harv. L. Rev. 619 (1954).

⁴⁴ American courts have felt free to re-examine the question of domicile as the jurisdictional basis for a foreign probate, but if the issue of domicile were litigated in the foreign proceeding a different result might follow. See *In re Lockwood's Will*, 147 N.Y.S.2d 106 (Surr. Ct. 1955).

there is at least as much reason to speak of such proceedings as foreign judgments as there is to classify foreign default money judgments in the same way. Separate rules for the treatment of all foreign default judgments may be necessary depending on the nature of the proceedings in which they originate, but this class of cases cannot simply be ignored by calling it administrative.⁴⁵ Similar considerations apply to foreign intestate proceedings, although the latter appear to be dealt with less frequently by statute.

MODERN AMERICAN THEORY

The picture of American law which emerges from this mixed bag of statutes and legal theories is not a scene of confusion. Thanks in part to cases and statutes but mostly to the careful work of a few legal scholars,⁴⁶ the rules for the treatment of foreign judgments have been mapped out in some detail. At least when public policy defenses have been measured by the positive law of the recognition forum rather than by the length of the chancellor's foot,⁴⁷ a fair degree of predictability has been obtained. This has not been achieved wholly at the expense of justice in particular cases, for it is difficult to condemn very many modern American cases in this field on the ground that the result was clearly wrong. The general pattern to be observed from the cases is one of enforcement and recognition,⁴⁸ and, except perhaps for our temporary adventure with the requirement of reciprocity, the long period of political isolationism in this country does not appear to have caused any serious political distortion of case results.⁴⁹

There is, nevertheless, growing need for a re-evaluation of this subject matter, a need made more urgent by the increasing frequency of the cases. The clear disposition of both courts and legal scholars to conduct the analysis of these problems at the level of mechanical rules hoists a flag warning of future misdirection. The unfortunate results which almost inevitably follow the failure to articulate reasons or policies underlying legal rules are already found in some of the American

⁴⁵ But see Nussbaum, *supra* note 20, at 237.

⁴⁶ Piggott, *Foreign Judgments and Jurisdiction* (3d ed. 1908); Reese, *supra* note 22; Wigmore, "The Execution of Foreign Judgments," 21 Ill. L. Rev. 1 (1926); Yntema, *supra* note 1. See also Read, *op. cit. supra* note 18 (dealing with the common-law units of the English Commonwealth).

⁴⁷ Compare *Zanzonico v. Neeld*, 17 N.J. 490, 111 A.2d 772 (1955), with *In re Gillies' Estate*, 8 N.J. 88, 83 A.2d 889 (1951).

⁴⁸ Goodrich, *Conflict of Laws* 526-527 (2d ed. 1938); Nadelmann, *supra* note 26, at 159; Reese, *supra* note 22, at 784; Yntema, "The Enforcement of Foreign Judgments in Anglo-American Law," 33 Mich. L. Rev. 1129 *passim* (1935).

⁴⁹ See note 80 *infra*.

cases. They may be expected to multiply as the cases become at once more frequent and more complex.⁵⁰

One of the first prerequisites for the needed reappraisal of this subject matter is a terminology appropriate to the underlying policy problems requiring clarification. In an article written in 1950, Professor Reese suggested that the doctrine of *res judicata* is the real policy basis for decisions in this area, although the "usual reasoning of the courts" and the "professed explanations" for recognition do not ordinarily penetrate that deeply.⁵¹ Reese did not pursue the point at length, and he seems to have assumed that putting an end to litigation is "the" policy basis of *res judicata*, whether applied to domestic or to foreign judgments.⁵² But his suggestion at least resurrected⁵³ a conceptual framework within which further inquiry could be pursued.

Perhaps the most appealing aspect of the *res judicata* concept in its application to foreign judgments is that it seems to offer a rationale for recognition and at the same time to provide built-in limitations on the effect to be given. In this respect it is comparable to the amalgamation of comity and enumerated defenses already considered. At least in its traditional form the *res judicata* concept does not suffer from the weakness of the comity and enumerated defenses amalgam, however, because it admits defenses at only one rather than at both ends of the concept. It thus appears to provide a sharper tool for the analysis of complex foreign judgment problems.

In order to be truly useful, however, a proposal for a *res judicata* approach to this subject must go beyond a mere preference for clean-cut terminology. If Reese is correct in suggesting that the *res judicata* doctrine is the "real basis" for decisions which recognize or enforce foreign judgments, then it follows that stripping that doctrine of the overburden of such confusing concepts as comity is not likely to produce much change in case results. More specifically, if the *res judicata* doctrine is conceived as resting on the single policy basis that there should be an end to litigation, and if that policy is already controlling case decision, then the explicit recognition of a *res judicata* approach does not do much more than tidy up the legal language.

⁵⁰ In addition to the increasing number of contacts which individuals make with foreign countries, it should be noted that greater mobility of persons, both natural and corporate, may result in litigation in more than two forums. See, e.g., *Bata v. Bata*, 163 A.2d 493 (Del. 1960) (Delaware, New York, Netherlands, Switzerland, Czechoslovakia); *Ambatielos v. Foundation Co.*, 203 Misc. 470, 116 N.Y.S.2d 641 (Sup. Ct. 1952) (England, Greece, New York).

⁵¹ Reese, *supra* note 22, at 784-85.

⁵² *Ibid.*

⁵³ Recognition of the role of *res judicata* in the foreign judgments field is by no means new. See *Hopkins v. Lee*, 19 U.S. (6 Wheat.) 109 (1821). Piggott suggested the

The first serious effort to carry the *res judicata* concept beyond a change in terminology appeared in an article by Professor Smit in 1962.⁵⁴ Recognizing that the American cases "evidence a clear judicial inclination to follow preconceived rules rather than to evaluate pertinent policy,"⁵⁵ Smit suggests that the application of the *res judicata* concept to foreign country judgments requires the recognition of new policies which may be quite different from those underlying the traditional doctrine in its domestic context.⁵⁶ This perceptive observation must certainly be regarded as a signal contribution to the literature in this field.

The balance of Professor Smit's stimulating article is devoted to the most comprehensive attempt made thus far to isolate and identify, in terms of the *res judicata* concept, the policies relevant to the recognition of foreign judgments. Justice cannot be done here to his persuasive arguments, but some attention must be given to his major premise. Noting the great differences between American law and foreign substantive and procedural law, as well as the different social, economic and political matrices in which judicial machinery must function, he establishes the major policy premise that the fairness of holding foreign judgments binding at all is "generally attenuated."⁵⁷ Similar considerations ". . . would seem to aggravate the general weakness of the policy underlying the doctrine of collateral estoppel so seriously as to prohibit application of that doctrine in its traditional form to foreign country judgments."⁵⁸ Tracing out the consequences of these general propositions in terms of factual problems and lesser policy considerations, he proposes for adoption in this field a number of extremely restrictive rules. Thus conclusive effect of the sort now usually accorded would be given only to judgments involving status or the *in-rem*-quasi-*in-rem* determination of interests in property.⁵⁹ Foreign *in personam* judgments would be given no binding effect at all if rendered against non-domiciliaries of the judgment forum.⁶⁰ Smit also concludes that estoppel effect should normally be given only to status matters or to the *in-rem*-quasi-*in-rem* determination of interests in property.⁶¹ An exception would be made to allow collateral estoppel effect if the whole

re-evaluation of the foreign judgments problem in the light of a combination of *res judicata* and comity doctrines over half a century ago. Piggott, *op. cit. supra* note 46.

⁵⁴ Smit, "International *Res Judicata* and Collateral Estoppel in the United States," 9 U.C.L.A.L. Rev. 44 (1962).

⁵⁵ *Ibid.*

⁵⁶ *Id.* at 61-74.

⁵⁷ *Id.* at 62, 64, 67 n.143.

⁵⁸ *Id.* at 62.

⁵⁹ *Id.* at 64-67.

⁶⁰ *Id.* at 68.

⁶¹ *Id.* at 69-71.

of a former in personam judgment (as opposed to a specific issue adjudicated therein) is drawn into question in the later collateral proceeding.⁶²

These conclusions will obviously not be encouraging to the proponents of greater conclusiveness for foreign judgments. Yet most of these restrictions follow logically enough once one grants Smit's premise that the rationale of the *res judicata* doctrine is necessarily weakened by its projection into the field of foreign judgments. In the present view that premise must be rejected, at least temporarily. The balance of the present article will be devoted to the development of a slightly different angle of attack on the problem of *res judicata* and foreign country judgments. In the process of doing so it is believed that the vulnerability of Smit's premise will be exposed, and that his restrictive conclusions can thereby be demonstrated to be premature, if not altogether unwarranted.

THE SCOPE OF THE RES JUDICATA RATIONALE

It has already been observed that the combination of the comity concept with the enumeration of specific defenses produced unsatisfactory theory because it rendered uncertain the defenses which could be made to recognition of foreign judgments.⁶³ In view of this experience perhaps the first inquiry which must be made with respect to any new approach is to ask whether it suffers from the same weakness.

On the purely domestic, intrastate level, the *res judicata* doctrine is a relatively unified concept. Even here, of course, it may be urged that the rationale of the doctrine rests on policy grounds other than the mere termination of litigation. Thus the convenience of the courts is a factor for consideration. The policy of ending litigation seems itself to proceed not merely from the policy of avoiding harassment of the previously successful party, but also from the interest of the society in reducing the degree of uncertainty in legal relationships between its members. But on the whole it seems safe to describe the domestic rationale of *res judicata* as the policy of ending litigation, even if that policy may be understood as comprehending possible subclasses of policy factors.

When the *res judicata* doctrine is projected to the level of sister-state judgments, a number of policies emerge which are unknown to the purely domestic concept. Most of these follow from the regulation of enforcement and recognition as a matter of constitutional law.⁶⁴ Res

⁶² *Id.* at 71-74.

⁶³ See text accompanying note 14 *supra*.

⁶⁴ See generally Jackson, Full Faith and Credit, The Lawyer's Clause of the Constitution (1945).

judicata and the full faith and credit requirement never have been and never can be identical concepts, for the obvious reason that *res judicata* has a domestic kingdom to rule which the full faith and credit requirement cannot enter. But when *res judicata* was lifted out of that domestic context and applied to sister-state judgments, it is apparent that it tended to merge with the full faith and credit concept both in the language and the reasoning of the American courts.⁶⁵ This followed naturally enough from the early interpretation of the full faith and credit clause, which almost from the outset was regarded as relating to the conclusiveness of judgments.⁶⁶ Since the clause was understood as putting a properly proved sister-state judgment upon the same footing as a domestic judgment,⁶⁷ the *res judicata* theory applicable to domestic judgments was logically extended to apply to those of sister states. The virtual coalescence of the two concepts is most clearly seen in those instances where a state court has been found *not* required to give full faith and credit, but where it has decided to recognize the sister-state adjudication anyway. In such cases recognition has usually been given on a theory of comity, rather than on the *res judicata* basis one might have expected if these concepts were still distinct.⁶⁸

It was also recognized at a very early date that a prime purpose of the constitutional provision was the ordering of legal relations between the sister states of a federal union.⁶⁹ This ordering principle, in

⁶⁵ See, e.g., *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 74-78 (1939); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-26 (1931).

⁶⁶ *Hanley v. Donoghue*, 116 U.S. 1 (1885); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813); *Aldrich v. Kinney*, 4 Conn. 380, 10 Am. Dec. 151 (1822); *Pritchett v. Clark*, 1 Del. (3 Harr.) 517 (Super. Ct. 1842); *Bissell v. Briggs*, 9 Mass. 461 (1813).

⁶⁷ *Bimeler v. Dawson*, 10 Ill. (4 Scam.) 536, 39 Am. Dec. 430 (1843); *McKim v. Odom*, 12 Me. 94 (1835); *Boston India Rubber Factory v. Hoit*, 14 Vt. 92 (1842). These early cases seemed to suggest that if a *res judicata* doctrine was applicable, it was that of the recognition forum. In this respect the language of the Act of 1790 implementing the full faith and credit clause (now 28 U.S.C. § 1738) was at first ignored, since it called for faith and credit to judgments of sister states equal to the effect they had in the place "... from which they are taken." This clearly means that the *res judicata* principles to be applied are those of the judgment forum. See *Thurber v. Blackburne*, 1 N.H. 242 (1818). But cf. *Graham v. Spencer*, 14 Fed. 603 (C.C.D. Mass. 1882). The matter is now well-settled as resting on judgment forum law rather than that of the recognition forum, but it should be noted that the full faith and credit clause is not interpreted as requiring the court of the recognition forum to take judicial notice of the *res judicata* effect which would be produced by the law of the judgment forum. *Treinies v. Sunshine Mining Co.*, *supra* note 65. If the sister-state law of *res judicata* is not proved, therefore, the court of the recognition forum would be justified in presuming that law to be the same as its own.

⁶⁸ See Ehrenzweig, *Conflict of Laws* 167-168 (1962).

⁶⁹ See, e.g., *Williams v. Preston*, 25 Ky. (3 J.J. Marsh.) 600, 20 Am. Dec. 179 (1830). Cf. *Penhallow v. Doane's Adm'rs*, 1 U.S. (1 Dall.) 84 (1795).

its various aspects, has unquestionably influenced case decision. The most obvious examples of such influence are to be seen in those Supreme Court cases holding that full faith and credit must be given to sister-state judgments (1) notwithstanding a strong public policy of the recognition forum against the cause of action underlying the judgment,⁷⁰ (2) notwithstanding the fact that the judgment was founded upon a revenue law of the sister state,⁷¹ and (3) notwithstanding a clear mistake made by the sister-state court, even if that mistake is apparent on the face of the record,⁷² and even if it was a mistake about the law of the recognition forum.⁷³ In the lower courts the defenses raised were apparently regarded as sufficient to override the policy of terminating litigation, as indeed they may have been on the sets of facts presented by these cases.⁷⁴ But the lower courts failed to consider that this policy is buttressed, in the sister-state cases, by the strong policy of the ordering principle.

Whether or not there are other policies which appear in relation to sister-state judgments need not now be considered because, for present purposes, the point to be made is already established. This is simply that when the *res judicata* doctrine is lifted out of its domestic habitat and applied to sister-state judgments, its rationale becomes more complex. Whether the composite concept thus produced is called *res judicata* or full faith and credit is not important. What is significant is that the rationale for enforcement and recognition of nondomestic judgments has become a bundle of complementary policies.

The implications of this lesson for *res judicata*, if that doctrine is to be projected beyond sister-state to foreign-country judgments, are not altogether obvious. One thing is clear: we ought not to assume without examination that the new policy factors which appeared at the sister-state level automatically carry over into this broader context. A few courts seem to have made this assumption, at least implicitly, by applying full faith and credit rules to foreign judgments.⁷⁵ The error of their ways has not passed unnoticed or uncriticized.⁷⁶

⁷⁰ *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

⁷¹ *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935).

⁷² *Milliken v. Myer*, 311 U.S. 457 (1940).

⁷³ *Fauntleroy v. Lum*, *supra* note 70.

⁷⁴ The *Milwaukee County* case was an action brought in the federal district court in Illinois; the original case was apparently not reported, but conformance with the Supreme Court opinion appears in *Milwaukee County v. M. E. White Co.*, 81 F.2d 753 (7th Cir. 1936). The *Lum* case arose in Mississippi and apparently was unreported. The *Myer* case arose in Colorado as a suit to void a Wyoming judgment. *Myer v. Milliken*, 101 Colo. 564, 76 P.2d 420 (1938), *subsequent opinion*, 105 Colo. 522, 100 P.2d 151 (1940).

⁷⁵ See, e.g., *Ambatielos v. Foundation Co.*, *supra* note 50.

⁷⁶ *Smit*, *supra* note 54, at 46.

On the other hand, neither can we assume without examination that the policies at the sister-state level have no validity when the doctrine is applied to foreign-country judgments. A number of American courts have grown fond of prefacing their remarks on the effect of foreign judgments by saying: The full faith and credit clause is inapplicable to foreign-country judgments.⁷⁷ Taken at its face value, that statement is irreproachable. But if it is meant to suggest that the *policies* of the full faith and credit clause have no application to foreign judgments because the clause itself has no such application, then one must ask for further explanation. It is certainly no answer to say that the absence of an international constitutional structure eliminates the reasons for the recognition or enforcement of foreign judgments.⁷⁸ If a policy basis for such recognition and enforcement exists, independent of any constitutional considerations, then this argument is revealed as standing on the strange assumption that constitutional provisions produce policies instead of being produced by them.

Turning to a consideration of the new policy factors which may enter into the *res judicata* rationale at the foreign judgments level, it is apparent that a strong case can be made for some policy of ordering relations between countries. Some such ordering principle seems to be the dominant policy underlying the comity doctrine, however clumsily it has been expressed through that doctrine.⁷⁹ In this respect it must be observed that the ordering principle operates in two different ways, and that part of the inexactitude of the comity concept may be attributable to the failure to make this distinction.

First, the ordering principle may be conceived as a sort of loose-jointed substitute for an effectively binding system of international law. According to this conception, the ordering of relations results from the pulling and hauling of separate legal systems toward the objective of mutual tolerance. From the policy standpoint it may be urged that such tolerance is desirable because it reduces friction between national entities, promotes commerce and contact between them, and ultimately serves the objective of international peace by making nations at once more interdependent and less distrustful of one another. The danger of implementation of this policy is that it may be thought to invite decision of particular cases on the basis of political bias rather than on the merits. Closer examination suggests that the real danger here lies in

⁷⁷ See, e.g., *Perdikouris v. The S.S. Olympos*, 185 F. Supp. 140 (E.D. Va. 1960); *Parker v. Parker*, 155 Fla. 635, 21 So. 2d 141 (1945).

⁷⁸ But see *Smit*, *supra* note 54, at 45-6.

⁷⁹ See *Hilton v. Guyot*, 159 U.S. 113, 163-166 (1895); *Draper's Ex'rs v. Gorman*, 35 Va. (8 Leigh) 628, 637 (1837). Cf. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488-89 (1900) (discussing function of comity within the federal system).

the method of implementation rather than in the policy itself. Thus the reciprocity requirement, used as a theory of retorsion to coerce acceptance of American judgments by denying effect to judgments of countries which do not recognize American judgments, is plainly open to the political bias criticism.⁸⁰ But such a retorsion theory is simply a defective method of implementing the ordering principle; instead of effectively serving this policy, it may in fact be destructive of it. A general presumption in favor of the enforcement and recognition of foreign judgments, on the other hand, serves this policy of order free of any such defect.

A second conception of the ordering principle turns the emphasis away from the relations of nations and back to the relations of the litigant parties. This can best be seen in its negative aspect. A flat refusal to recognize the effect of foreign adjudication does not order the legal relationships of the litigants, but on the contrary tends to confuse these by producing conflicting duties or contradictory relations as between the two or more legal systems with which each of these individuals has contact. The promotion of uniformity, whether in terms of status or rights or duties, is the policy taproot of most choice of law rules in the conflict of laws scheme.⁸¹ That policy would seem to be intensified in its application to the foreign judgments problem, because in the latter area the legal relations of the individual have become in some degree fixed by the foreign adjudication. Adherence to the standard set by the foreign judgment will promote this uniformity just as ignoring the foreign judgment will tend to destroy it. Enforcement and recognition can therefore serve an ordering principle with respect to individuals, by providing a rational process for sorting out their private legal relations when they are caught in a snarl of litigation in two different legal systems.

Still another important policy which must be considered as falling within the scope of the *res judicata* rationale is the policy in favor of the finality of American adjudications which may later be drawn into question in a foreign court.⁸² It has already been noted that retorsion, as exemplified by the reciprocity requirement, is an unwise method of trying to achieve this result. But the policy in favor of finality for

⁸⁰ See the dissenting opinion of Fuller, C.J., in *Hilton v. Guyot*, *supra* note 79, at 234. See also Reese, "The Status in This Country of Judgments Rendered Abroad," 50 *Colum. L. Rev.* 783, 790-93 (1950).

⁸¹ Griswold, "In Reply to Mr. Cowan's Views on Renvoi," 87 *U. Pa. L. Rev.* 257, 261 (1939). *Cf.* *Ambatielos v. Foundation Co.*, *supra* note 50, at 474-5, 116 *N.Y.S.2d* at 647.

⁸² See Nadelmann, "Non-Recognition of American Money Judgments Abroad and What To Do About It," 42 *Iowa L. Rev.* 236 (1957).

American judgments must be accounted for, and this policy is somewhat different from the ordering principle already discussed. It looks neither to the relations of states nor to the relations of the particular parties now litigants. It aims rather at preserving the interests of future litigants in American courts who may find it necessary to export their judgments for enforcement or recognition. In short, the reciprocity requirement has been pretty well discredited in the United States, but it remains as one of the facts of life of foreign legal systems.⁸³ Any rule which tends to restrict the conclusive effect of foreign adjudication in American courts therefore tends to diminish the chances for recognition of American judgments in foreign courts. At least if we understand them and make them understood,⁸⁴ rules which favor the recognition of foreign judgments will promote increased finality for American judgments abroad.⁸⁵

Several conclusions may be drawn at this point. First, it is apparent that new policy factors appear when the *res judicata* doctrine is lifted from its domestic context and applied to nondomestic judgments. If we truly wish to account for these factors in a policy-oriented approach to the problem of foreign-country judgments, however, we must be prepared to account for those policies which strengthen the *res judicata* rationale as well as for those which weaken it. Two such strengthening factors have been described as the ordering principle and the policy of finality for American judgments raised abroad. These policies complement the policy of ending litigation, which may still be regarded as the basic ingredient of the *res judicata* rationale.

⁸³ See Gutteridge, "Reciprocity in Regard to Foreign Judgments," 13 Brit. Yb. Int'l L. 49 (1932); Lenhoff, "Reciprocity: The Legal Aspect of a Perennial Idea," 49 Nw. U.L. Rev. 619, 752 (1954); Lorenzen, "The Enforcement of American Judgments Abroad," 29 Yale L.J. 188, 268 (1919); Mowitz, "The Execution of Foreign Judgments in Germany," 81 U. Pa. L. Rev. 795 (1933); Nadelmann, "Reprisals Against American Judgments?," 65 Harv. L. Rev. 1184 (1952). For a current picture of the requirements of various countries see Buelow-Arnold, *Internationaler Rechtsverkehr* (Supp. to 1960).

⁸⁴ See Feller, "Die Vollstreckbarkeit von Urteilen amerikanischer Gerichte in Deutschland," 60 Juristische Wochenschrift 112 (1931). Feller's principal thesis is that the refusal of the German Reichsgericht to enforce a California judgment (RG 70, 434) was not justified, and was largely a result of misunderstanding of California law.

⁸⁵ It is probable that part of the lack of understanding by other countries of the very liberal view taken by most American courts toward foreign judgments has resulted from the lack of any completely comprehensive compilation of the American law. Even such complete works as that of Buelow-Arnold states merely that the situation in the United States must be determined from an examination of the law of each particular state. Buelow-Arnold, *op. cit. supra* note 83, at 991-97. Since the precedents in many states are out of date and thus not in accord with modern American notions of jurisdiction, the possibility of uniform state legislation is particularly appealing. See Nadelmann, "The United States of America and Agreements on Reciprocal Enforcement of Foreign Judgments," 1 Neth. Int'l L. Rev. 156, 170-72 (1953).

Second, it must be conceded that the internal consistency of *res judicata* theory may be disturbed by its acquisition of this complex rationale. This was essentially the problem of the comity concept, and the nature of the problem is not altered by giving it a new name. If all of the relevant policies in this area are to be accounted for, as they must be under any approach which pretends to be policy-oriented, then it must also be recognized that the defenses to recognition and enforcement undergo a similar tendency toward complexity. *Res judicata* projected to the foreign judgment level must therefore be treated as a composite concept containing both a complex policy rationale and a complex of policy defenses.

To the extent that the weakness of the comity doctrine is attributable to the failure to articulate relevant policy considerations, there is some value in a reappraisal which does no more than expose some of these policies. If the *res judicata* approach is to be offered as a substitute for comity, however, it must somehow deal more effectively with the relationship between its complex rationale and the possible defenses.

THE NATURE OF THE ENUMERATED DEFENSES

The first step which must be taken in order to bring the defenses into some logically manageable form is simply to recognize that all possible objections to the recognition of foreign judgments are defenses. Stated in this fashion the proposition seems almost tautological, but it has been far from obvious in the development of the case law under the comity doctrine. The tendency of comity to let defenses in by the back door has already been noted.⁸⁶ This practice probably helped to conceal the complex nature of the rationale for recognition and clearly discouraged close analysis of the traditional defenses.

If this approach is taken, then a catalog of the defenses which have been used to defeat the effect of foreign judgments will include: (1) insufficient authentication or proof of the foreign judgment;⁸⁷ (2)

⁸⁶ See cases cited note 14 *supra*. It may well be that *res judicata* analysis is not wholly free from the same danger. Consider the following statement: "Thus, the desire to deal justly with individual litigants is increasingly realized not to be a policy competing—or even conflicting—with the rationale of the doctrine of *res judicata*." Smit, *supra* note 54, at 59.

⁸⁷ See, e.g., *Boehmer v. Heinen*, 138 Neb. 376, 293 N.W. 237 (1940); *Vandervoot v. Smith*, 2 Cal. R. 154 (N.Y. Sup. Ct. 1804); *Cooke v. Cooke*, 67 Utah 371, 248 Pac. 83 (1926). Authentication must be according to local statutory requirements, but the seal of the foreign court is probably not alone sufficient. *Delafield v. Hand*, 3 Johns. R. 310 (N.Y. Sup. Ct. 1808). But see *Chew v. Keck*, 4 Rawle 162 (Pa. 1833). A judgment may be proved by parol evidence, however, if it is shown that the original record is lost, *Trevino v. Fernandez*, 13 Tex. 630 (1855), or destroyed, *Estate of Gonzalez*, 6 Misc. 2d

lack of finality of the foreign judgment;⁸⁸ (3) lack of subject-matter jurisdiction;⁸⁹ (4) lack of personal jurisdiction;⁹⁰ (5) insufficiency of notice or opportunity to be heard;⁹¹ (6) procurement of the foreign judgment by extrinsic fraud;⁹² (7) clear mistake of fact or law made by the foreign court in rendering the judgment;⁹³ and (8) the foreign judgment contravenes the public policy of the recognition forum. The public policy defense is subject to further subdivision, of which four principal subtypes may be noted: (a) the reciprocity requirement;⁹⁴

118, 156 N.Y.S.2d 28 (Surr. Ct. 1956). Unless it is clear under the local statute that this is unnecessary, it is wise to have a translation of the foreign judgment itself authenticated, *Martens v. Martens*, 284 N.Y. 363, 31 N.E.2d 489 (1940).

⁸⁸ *Boissevain v. Boissevain*, 252 N.Y. 178, 169 N.E. 130 (1929); *Munn v. Cook*, 55 Hun. 608, 8 N.Y. Supp. 698 (Sup. Ct. 1890); *Dulles v. Dulles*, 369 Pa. 101, 85 A.2d 134 (1952); *Burnside v. Burnside*, 2 Dauph. 261 (Pa. County Ct. 1899); *In re Pearson's Estate*, 6 Pa. County Ct. 298 (1889); *Kordoski v. Belanger*, 52 R.I. 268, 160 Atl. 205 (1932); *Cooke v. Cooke*, *supra* note 87.

⁸⁹ *In re Gillies' Estate*, 8 N.J. 88, 83 A.2d 889 (1951), *Romanchick v. Howard Sav. Institute*, 118 N.J.L. 606, 194 Atl. 185 (E. & A. 1937); *In re Lockwood's Will*, 147 N.Y.S.2d 106 (Surr. Ct. 1955); *Hansen v. Hansen*, 255 App. Div. 1016, 8 N.Y.S.2d 655 (1938); *McEwen v. McEwen*, 50 N. D. 662, 197 N.W. 862 (1924); *San Lorenzo Title Improvement Co. v. City Mortgage Co.*, 124 Tex. 25, 73 S.W.2d 513 (1934).

⁹⁰ *Thorn v. Salmonson*, 37 Kan. 441, 15 Pac. 588 (1887); *Kerr, Brown & Co. v. Condy*, 72 Ky. (9 Bush) 372 (1872); *Succession of Lorenz*, 41 La. Ann. 1091, 6 So. 886 (1889); *Wilson v. Gibson*, 214 Mo. App. 219, 259 S.W. 491 (1924); *Rhodesian Gen. Fin. & Trading Trust Co. v. MacQuisten*, 170 Misc. 996, 11 N.Y.S.2d 476 (Sup. Ct. 1939); *Skandinaviska Granit Aktiebolaget v. Weiss*, 226 App. Div. 56, 234 N.Y. Supp. 202 (1929); *Smith v. Grady*, 68 Wis. 215, 31 N.W. 477 (1887).

⁹¹ See *The Maria*, 20 F. Supp. 284 (E.D. Va. 1936); *McEwan v. Zimmer*, 38 Mich. 765, 31 Am. Rep. 332 (1878); *In re Deckert's Will*, 141 N.Y.S.2d 855 (Surr. Ct. 1955); *In re Paramythiotis' Estate*, 15 Misc. 2d 133, 181 N.Y.S.2d 590 (Surr. Ct. 1958); *China Mut. Ins. Co. v. Force*, 142 N.Y. 90, 36 N.E. 874 (1894); *Banco Minero v. Ross*, 106 Tex. 522, 172 S.W. 711 (1915). But see *Quintana v. Quintana*, 101 N.Y.S.2d 593 (Sup. Ct. 1950).

⁹² *Weil v. Poulsen*, 121 Conn. 281, 184 Atl. 580 (1936); *Stewart v. Warner*, 1 Day. 142, 2 Am. Dec. 61 (Conn. 1803); *Ogden v. Ogden*, 159 Fla. 604, 33 So. 2d 870 (1948); *Tremblay v. Aetna Life Ins. Co.*, 97 Me. 547, 55 Atl. 509 (1903), *writ of error dismissed*, 223 U.S. 185 (1912); *In re Topcuoglu's Will*, 11 Misc. 2d 859, 174 N.Y.S.2d 260 (Surr. Ct. 1958); *Goldstein v. Goldstein*, 166 N.Y. Supp. 1074 (Sup. Ct. 1917); *May v. Roberts*, 133 Ore. 643, 286 Pac. 546 (1930).

⁹³ See statutes cited note 34 *supra*. It was not uncommon for the earlier cases to refer to the defense of mistake in dicta, e.g., *Lazier v. Westcott*, 26 N.Y. 146, 82 Am. Dec. 404 (1862). But references to mistake as a defense are generally omitted from the later cases, apparently on the theory that if a mistake was committed, this was a matter which the injured party could and should correct by appeal or other reference to the courts of the judgment forum. See *Dunstan v. Higgins*, 138 N.Y. 70, 33 N.E. 729 (1893).

⁹⁴ *Hilton v. Guyot*, *supra* note 79; *Harrison v. Triplex Gold Mines, Ltd.*, 33 F.2d 667 (1st Cir. 1929); *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 34 Atl. 714 (1895); *Northern Aluminum Co. v. Law*, 157 Md. 641, 147 Atl. 715 (1929). Cf. *Gull v. Constam*, 105 F. Supp. 107 (D. Colo. 1952).

(b) the foreign judgment was rendered under laws of purely local applicability, including penal or quasi-criminal laws;⁹⁵ (c) the foreign judgment was rendered upon a cause of action unknown or outlawed in the recognition forum;⁹⁶ and (d) the foreign judgment was rendered under foreign law deemed by the recognition forum to be grossly unfair.⁹⁷

In one sense all of the enumerated defenses pose the question whether the rationale for recognition is stronger than the reasons for nonrecognition. To this extent all of the defenses may be considered as raising policies in competition with the policy underlying the rationale for recognition. If analysis is left at this level, however, there is little basis for understanding either the nature of the defenses or their relative strength.

Accordingly, it is suggested that the defenses may be classified by their relationship to the *res judicata* rationale. If this is done, some of the defenses will be seen to stand on policy which is wholly distinct from the rationale and truly in competition with it. For the sake of simplicity, these may be called the independent defenses. A second group consists of defenses whose nature is just the converse, that is, their validity depends not on distinct policy considerations but upon weakening the recognition rationale. These may be called the dependent defenses. A third category, partaking in varying measure of the features of both the other groups, may be called the mixed defenses.

The clearest examples of the independent defenses are lack of jurisdiction and insufficiency of notice or opportunity to be heard. The defenses based on gross unfairness of the foreign law and on failure of authentication or proof of the foreign judgment belong to this category as well. The independent policy on which each of these defenses stands is the requirement of a basic minimum of fairness to the individual litigant against whose interest the foreign judgment is offered, although that policy is susceptible of subdivision into somewhat more concrete terms for each of the defenses.

The extended treatment which each defense deserves cannot be undertaken here, but at least a few basic observations must be offered with

⁹⁵ *In re Neidnig's Estate*, 123 App. Div. 894, 108 N.Y. Supp. 478 (1908); *Kordoski v. Belanger*, *supra* note 88. See also *Weil v. Weil*, 26 N.Y.S.2d 467 (Dom. Rel. Ct. 1941), in which a Danish divorce decree was questioned after remarriage of plaintiff-wife in Michigan. The New York court suggested that a successful attack on the decree *might* have been made by showing that the Danish decree was void either under New York or under Michigan law. *But see* *Neporany v. Kir*, 5 App. Div. 2d 438, 173 N.Y.S.2d 146 (1958).

⁹⁶ *De Brimont v. Penniman*, 7 Fed. Cas. 309 (No. 3715) (C.C.S.D.N.Y. 1873).

⁹⁷ *Banco Minero v. Ross*, *supra* note 91.

respect to the especially important defense of lack of jurisdiction. The unfortunate tendency of American courts to express a great variety of notions of fairness in terms of jurisdictional principles, both in domestic internal law and in conflict of law rules, greatly complicates analysis.⁹⁸ Whether or not the foreign court had jurisdiction must ultimately be tested by the notions of fairness held by the court of the recognition forum,⁹⁹ although some attention may be paid to whether or not the foreign court acquired jurisdiction according to its own law.¹⁰⁰ Since a determination of fairness in this jurisdictional usage depends largely on finding some rational connection between the forum and the persons or subject matter involved in the litigation, the court to which a judgment is presented for recognition is likely to look to its own rules for acquiring jurisdiction to determine whether the connection with the foreign court was rational.¹⁰¹

The extraordinary strength of the independent defenses, which almost always prevail if facts to support them can be established, is well

⁹⁸ See Smit, "The Terms Jurisdiction and Competence in Comparative Law," 10 *Am. J. Comp. L.* 164 (1961); Nussbaum, "Jurisdiction and Foreign Judgments," 41 *Colum. L. Rev.* 221 (1941).

⁹⁹ See cases cited note 90 *supra*. This is one of the areas in which the projection of full faith and credit notions to the foreign level creates confusion. At least on the national level the United States Supreme Court can act as an arbiter of what will or will not suffice for either subject matter jurisdiction or personal jurisdiction, and it may choose to exercise this power in light of the "ordering" aspect of full faith and credit. *Cf.* *Sovereign Camp v. Bolin*, 305 U.S. 66 (1938). The absence of any such arbiter for foreign judgment cases is obviously a potential source of great variation between states' laws on this subject. See *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185 (1912). It is, of course, possible that the Supreme Court may assume the role of arbiter through the due process clause rather than the full faith and credit clause. The Court has indicated in dictum that recognition of a foreign judgment on either a full faith and credit or a comity theory would be a violation of due process if the foreign court lacked jurisdiction. *Griffin v. Griffin*, 327 U.S. 220, 229 (1946).

¹⁰⁰ Earlier cases not infrequently suggested that it would be a defense to recognition or enforcement to show that the judgment had been "irregularly obtained." See, e.g., *Aldrich v. Kinney*, *supra* note 66; *Draper's Ex'rs v. Gorman*, *supra* note 79. *Cf.* *Lazier v. Westcott*, *supra* note 83. *But see* *Pemberton v. Hughes*, [1899] 1 Ch. 781. Subject only to the dictates of the due process clause, the requirement in the case of sister-state judgments is that the jurisdiction of the judgment forum shall be tested by its own rules for acquiring jurisdiction, not by the rules of the recognition forum. *Adams v. Saenger*, 303 U.S. 59 (1938). This may be an area where the absence of any international constitutional structure calls for a different result on the international level. See Smit, *supra* note 54. See also Reese, *supra* note 80, at 789-90. *Cf.* *Caruso v. Caruso*, 106 N.J. Eq. 130, 148 Atl. 882 (E. & A. 1930). *But cf.* *Scott v. Scott*, 51 Cal. 2d 249, 254, 331 P.2d 641, 644 (1958) (concurring opinion by Justice Traynor); *Palmarito de Cauto Sugar Co. v. Warner*, 225 App. Div. 261, 232 N.Y. Supp. 569 (1929); *Oettgen v. Oettgen*, 196 Misc. 937, 94 N.Y.S.2d 168 (Sup. Ct. 1949).

¹⁰¹ See Reese, *supra* note 80, at 789-90 and cases cited therein.

illustrated by the defense of lack of jurisdiction in the foreign court. Although the American courts are perfectly willing to concede that mere differences of the foreign law from our law should not prevent recognition of foreign judgments,¹⁰² still they rather consistently have indulged in the presumption that our methods of acquiring jurisdiction are the only rational ones, and that foreign judgments rendered in reliance upon different methods should not be enforced.¹⁰³ This has led to some interesting and incongruous results. At least before the American courts generally recognized the domicile of the defendant in the forum as a rational basis for acquiring personal jurisdiction over him by service of process made outside the forum, a foreign judgment in personam rendered on the basis of jurisdiction acquired in this fashion would not be recognized.¹⁰⁴ A shift in American opinion as to the reasonableness of this method¹⁰⁵ was followed by the enforcement of foreign judgments based on that method.¹⁰⁶ Consent to the jurisdiction of the foreign court has generally been regarded as a rational connection,¹⁰⁷ but casual contacts such as the making of a contract in the foreign country have not been regarded as a rational basis for extra-territorial service of process.¹⁰⁸ It will be interesting to see if the pres-

¹⁰² *Compania Mexicana Radiodifusora Franteriza v. Spann*, 41 F. Supp. 907 (N.D. Tex. 1941), *aff'd*, 131 F.2d 609 (5th Cir. 1943); *Baker v. Palmer*, 83 Ill. 568 (1876); *Caruso v. Caruso*, *supra* note 100.

¹⁰³ *Compagnie Du Port De Rio De Janeiro v. Mead Morrison Mfg. Co.*, 19 F.2d 163 (S.D. Me. 1927); *Henderson v. Drake*, 138 Cal. App. 2d 671, 292 P.2d 254 (1956); *Traders' Trust Co. v. Davidson*, 146 Minn. 224, 178 N.W. 735 (1920); *Skandinaviska Granit Aktiebolaget v. Weiss*, *supra* note 90.

¹⁰⁴ See cases cited note 103 *supra*. But see *Buttrick v. Allen*, 8 Mass. 273, 5 Am. Dec. 105 (1811).

¹⁰⁵ The stamp of approval was finally put upon this method of service by the Supreme Court in 1940, *Milliken v. Myer*, *supra* note 72. But acceptance of this procedure had long preceded the *Milliken* case in some states. See, e.g., *In re Hendrickson*, 40 S.D. 211, 167 N.W. 172 (1918). Cf. *Hurlbut v. Thomas*, 55 Conn. 181, 10 Atl. 556 (1887).

¹⁰⁶ See, e.g., *Rhodesian Gen. Fin. & Trading Trust Ltd. v. MacQuisten*, *supra* note 90.

¹⁰⁷ *Regierungspraesident Land Nordrhein Westfalen v. Rosenthal*, 17 App. Div. 145, 232 N.Y.S.2d 963 (1962); *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931). But cf. *Bobala v. Bobala*, 68 Ohio App. 63, 33 N.E.2d 845 (1940); *In re Davis' Will*, 31 Misc. 2d 270, 219 N.Y.S.2d 533 (Surr. Ct. 1961). Personal service within the foreign country, even if it occurred during a temporary stay, has been held sufficient on the theory that entering the country is a consent to jurisdiction of the courts there in the sense that the foreigner owes a temporary allegiance to the tribunals of the country he enters. See *Fisher, Brown & Co. v. Fielding*, *supra* note 94.

¹⁰⁸ "It is to be noted . . . that the mere transaction of business in a State by a non-resident natural person does not imply consent to be bound by the process of the courts." *Skandinaviska Granit Aktiebolaget v. Weiss*, *supra* note 90, at 59, 234 N.Y.

ently changing attitudes in the United States toward the reasonableness of such a basis for out-of-state service¹⁰⁹ will be reflected in future treatment of foreign judgments rendered on such a basis. In approaching this problem, the American courts would do well to consider the policies underlying their own choice of law rules. If the case is one in which the recognition forum's choice of law rule would refer to the substantive law of country X for the rules of decision as to the underlying cause of action, it seems a bit incongruous for the recognition forum to deny that a rational connection existed between country X and the underlying transaction, sufficient at least to justify personal service on the defendant outside of X.

Turning now to the dependent defenses, it is apparent that some preliminary assessments must be made. Since these defenses derive their validity solely from the weakness of the rationale for recognition, new account must be taken of the complex nature of the *res judicata* rationale. As a working hypothesis it is suggested that a defense of this kind, in order to prevail, must destroy all parts of the recognition rationale which could stand alone. This requires, of course, an assessment of the self-sufficiency of each of the policies considered as comprising the *res judicata* rationale. Clearly the policy of ending litigation is self-sufficient, in the sense of constituting sufficient reason in itself for recognition. Beyond this, measurement becomes difficult. The writer is inclined to regard the so-called ordering principle as self-sufficient also, but for the present it may be well to proceed more cautiously. The assumption will be made, therefore, that only the policy for terminating litigation can stand alone and that all other relevant policies merely buttress it.

Further problems of measurement can best be seen by considering a specific example. The defense of lack of finality of the foreign judgment seems to be a dependent defense because what it suggests is that no foreign adjudication as yet exists.¹¹⁰ It does not deny the existence of

Supp. at 207. Cf. *Ross v. Ostrander*, 192 Misc. 140, 79 N.Y.S.2d 706 (Sup. Ct. 1948); *Kerr v. Tagliavia*, 101 Misc. 614, 168 N.Y. Supp. 697 (Sup. Ct. 1917), *aff'd*, 186 App. Div. 893, 172 N.Y. Supp. 901 (1918).

¹⁰⁹ See, e.g., Ill. Ann. Stat. ch. 110, §§ 16, 17 (Smith-Hurd 1956). See also *New York Times Co. v. Conner*, 291 F.2d 492 (5th Cir. 1961) (constitutional question avoided by narrow interpretation of Alabama statute).

¹¹⁰ *In re Cleland's Estate*, 119 Cal. App. 2d 18, 258 P.2d 1097 (1953). See also cases cited note 88 *supra*. The defense of lack of finality bears an obviously close resemblance to the claim of *lis pendens*, as a plea in abatement. Domestic proceedings are often stayed pending the completion of foreign proceedings as a matter of "comity" and in the discretion of the trial court, but this may be refused if it appears that the issues in the foreign proceedings are not identical with those in the domestic forum and that the domestic forum is equally convenient. See *Pesquera Del Pacifico S. De. R.L. v.*

foreign litigation, but merely asserts that no effect should be given to the foreign proceedings because their result is uncertain. This represents a direct attack on the policy of ending litigation, since that policy requires some definitive conclusion to litigation before it comes into play. Similarly, this defense is capable of destroying the supplementary policies of *res judicata* as well. It asserts that there is as yet no right, duty or status for the ordering principle to order. It can even turn the other facet of the ordering principle inside out, so as to suggest that friction with the other legal system can best be avoided by taking no action whatever in the present forum until a final foreign result is achieved. In similar fashion it cuts the ground from under the policy of finality for American judgments, by suggesting that American courts would not want foreign courts to jump the gun on American judgments by giving them effect before their results were final.

In this way all parts of the recognition rationale can be destroyed by a dependent defense. Finality, however, is by no means a clear-cut concept. If the foreign court *has* rendered a judgment or decree, and the defense asserts merely that the foreign judgment is subject to change by the foreign court, then an entirely different picture is presented. Insofar as the change which may be made in the foreign judgment cannot be made retroactive, then all of the policies for recognition remain fully applicable and the judgment should be recognized or enforced.¹¹¹ If the potential change can be made retroactive, then the litigation-ending policy of *res judicata* is seriously weakened, but the supplementary policies are virtually untouched.¹¹² Then the problem of

Superior Court, 89 Cal. App. 2d 738, 201 P.2d 553 (1949). *Cf.* *Oakland Truck Sales Inc. v. United States*, 149 F. Supp. 902 (Ct. Cl. 1957). *But see* *Grey v. Independent Order of Foresters*, 196 S.W. 779 (Mo. App. 1917).

¹¹¹ *Porges v. Louis-Dreyfus*, 280 App. Div. 277, 113 N.Y.S.2d 86 (1952). The finality of a foreign temporary order of support, pending the conclusion of a matrimonial action, has also been held to establish a maximum beyond which the recognition forum should not order additional payment. *Di Benedetto v. Di Benedetto*, 284 App. Div. 982, 135 N.Y.S.2d 74 (1954).

¹¹² *Kordoski v. Belanger*, *supra* note 88. One method of meeting this problem is to permit the other party to appear and seek a modification in the recognition forum to the same extent that change would be permitted in the judgment forum. See *Herczog v. Herczog*, 186 Cal. App. 2d 318, 9 Cal. Rep. 5 (1960). Such an approach runs squarely into the objection that the effect of the foreign judgment, if measured by the law of the judgment forum, raises numerous problems of interpretation of foreign law. Smit, "International *Res Judicata* and Collateral Estoppel in the United States," 9 U.C.L.A.L. Rev. 44, 63 (1962). Although the problems of proof of foreign law may indeed be formidable, the present writer is inclined to believe that the matter can be handled fairly by the development of presumptions as to the foreign law, always leaving it open to any party to establish what that law actually provides. From a practical standpoint it also seems unlikely that many American courts could be persuaded to measure the

measurement of policy strength becomes crucial. A working hypothesis here might be the following: If the policy of terminating litigation is merely weakened and not destroyed, and if the other policies of the *res judicata* rationale are unaffected, then the defense must fail.

Another example of the dependent defense is the reciprocity requirement, and under the analysis here proposed, its fatal weakness as a defense is laid bare. The questionable effectiveness of the reciprocity rule to serve either the policy of finality for American judgments or the ordering principle has already been discussed.¹¹³ As a defense, that is, that the foreign judgment should not be recognized because the foreign forum does not recognize American judgments, it therefore does no more than weaken the supplementary policies of the *res judicata* rationale. Even if it be assumed that the supplementary policies are wholly destroyed, the basic ingredient of *res judicata* remains untouched. Against the litigation-ending policy, the reciprocity defense suggests only that litigation should not be ended because other policies in favor of recognition have become inapplicable.

Still another defense in the dependent category is that which opposes recognition because the laws under which the foreign judgment was rendered are deemed to be only locally applicable. This type of defense has been criticized,¹¹⁴ and its extreme weakness is especially apparent when the law of the recognition forum makes similar provision for dealing with the same problem. Thus it is patently absurd to refuse recognition to a foreign filiation order for lying-in expenses and support of the illegitimate child when the recognition forum provides precisely the same remedies under its own bastardy statutes.¹¹⁵ Arguments that filiation proceedings are quasi-criminal are also not persuasive, for, at least so long as the recognition forum has similar provisions, none of the various policies for recognition are seriously affected.¹¹⁶

effect of foreign judgments solely by recognition forum rules because of the persistent danger that this would be to give the judgment greater effect than it would be entitled to in the state of rendition. Smit avoids this difficulty, rather easily, by suggesting that under the restrictive rules he proposes, the problem would rarely arise. Smit, *supra* at 63 n.126. It is to be hoped that the American courts will continue to prefer the illness to such a rigorous cure. See *In re Cleland's Estate*, *supra* note 110.

¹¹³ See authorities cited notes 80, 83 *supra*.

¹¹⁴ Reese, *supra* note 80, at 797.

¹¹⁵ *But cf.* Kordoski v. Belanger, *supra* note 88. The Rhode Island court did not even mention its own statute, R.I. Gen. Laws Ann. § 15-8-3 (1956), in effect in Rhode Island since 1896. Instead it noted that there was no duty at common law to support an illegitimate child, and although it recognized that this rule has been changed by statute in most states, the court seems to have held that such changes in the common law are to be given only local effect.

¹¹⁶ See Coveney v. Phiscator, 132 Mich. 258, 93 N.W. 619 (1903) (holding a col-

A distinction should be carefully drawn between the "locally effective" judgments just considered and those which are founded on causes of action unknown or outlawed in the recognition forum. Treatment of the latter would seem to depend on whether or not the law of the recognition forum expresses some active policy against the enforcement of such a cause of action *anywhere*.¹¹⁷ If such a positive law policy exists, then a defense based upon it would have to be classified as independent and therefore strong. If the foreign proceeding is simply one unknown to the forum, and if no positive policy against it appears, then the defense would be dependent and weak.¹¹⁸ If there is a local policy against the foreign cause of action, but it is interpreted as a policy of only local applicability, then the defense may also be regarded as dependent and quite weak.¹¹⁹ In that event the local policy against the cause of action may simply be regarded as irrelevant. A similar result may be reached, perhaps, even if the local policy is relevant, on the theory that the cause of action is merged in the foreign judgment.¹²⁰

Before passing on to a consideration of the so-called mixed defenses, it may be well to consider a feature of the proposed classification scheme suggested by the examples last considered. With the single exception of the failure of proof of the foreign judgment, which presents a rather special case, all of the independent defenses suggest that the foreign judgment should never have been rendered at all. The dependent defenses, on the other hand, do not deny the propriety of the foreign proceedings. They suggest only that the foreign adjudication

lateral attack on a Canadian criminal conviction not permissible). *But see In re Neidnig's Estate*, *supra* note 95 (declining to give collateral estoppel effect to a foreign filiation proceeding).

¹¹⁷ No modern cases have been found in which American courts candidly stated such an attitude. Perhaps this is the result of reluctance to sit in judgment on the foreign law, but the distinction seems nonetheless useful. Reese suggests that the case of *De Brimont v. Penniman*, *supra* note 96, falls in this category. Reese, *supra* note 80, at 797. But the court in that case specifically held that the purpose of the French statute in question was local, "... framed for the people of France, to regulate their domestic concerns, protect the public, and guard against pauperism and its evils." 7 Fed. Cas. at 310-11.

¹¹⁸ *But cf. De Brimont v. Penniman*, *supra* note 96.

¹¹⁹ *Neporany v. Kir*, *supra* note 95.

¹²⁰ *Ibid.* *But cf. Oilcakes & Oilseeds Trading Co. v. Sinason Teicher Inter American Grain Corp.*, 9 Misc. 2d 651, 170 N.Y.S.2d 378 (Sup. Ct. 1958), *modified on other grounds*, 7 App. Div. 2d 977, 183 N.Y.S.2d 838 (1959), *aff'd mem.*, 8 N.Y.2d 852, 203 N.Y.S.2d 904, 168 N.E.2d 708 (1960). It seems generally to have been assumed that a foreign judgment does not merge the underlying cause of action. *Swift v. David*, 181 Fed. 828 (9th Cir. 1910); *New York, L.E. & W. Ry. Co. v. McHenry*, 17 Fed. 414 (S.D.N.Y. 1883). *But see Alaska Commercial Co. v. Debney*, 2 Alaska 303 (1904).

should not be given any extraterritorial effect. It seems more than coincidental that the former defenses have been regarded as strong by the American courts, while the latter have been viewed as relatively weak. Perhaps another working hypothesis can be derived from this: If a defense raised fails to attack the propriety of the foreign judgment *in its foreign setting*, then the defense should enjoy no presumptions of validity. This would not eliminate the use of such defenses altogether, but would require that they be treated as more than mechanical rules. In order to prevail, in other words, such a defense should be required to clearly demonstrate that it destroys or renders inapplicable the rationale for recognition.

The two remaining defenses, procurement by fraud and mistake of law or fact, have been called the mixed defenses in the proposed classification because they simultaneously stand on independent policy and attack the rationale for recognition. Somewhat different considerations apply to each.

Notwithstanding broader language in some of the cases,¹²¹ it appears to be well-settled that only "extrinsic fraud" is a defense to a foreign judgment.¹²² Such fraud is that which, by its very nature, could not have been passed upon by the foreign court. The classic example is that of the plaintiff who obtains jurisdiction over the defendant and then induces him not to defend by representing that the action is being withdrawn,¹²³ or that it is merely a "friendly" suit.¹²⁴ The defrauded party is thereby denied his proper day in court, and a default judgment taken by plaintiff can be collaterally attacked when plaintiff tries to enforce it elsewhere.

The independent policy of fairness permitting such a defense to be

¹²¹ It is at least arguable that a very broad notion of fraud is contained in the defense that the foreign judgment was "irregularly obtained." See authorities cited note 100 *supra*. A rather large number of cases have referred merely to the defense of "fraud" without specifying the nature of the fraud. See, e.g., *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81 (1882), *writ of error dismissed sub nom.*, *Roth v. Ehman*, 107 U.S. 319 (1882); *Thorn v. Salmonson*, *supra* note 90; *Dunstan v. Higgins*, *supra* note 93.

¹²² The leading American (domestic law) case is *United States v. Throckmorton*, 98 U.S. 61 (1878). This rule has generally been followed in foreign judgment cases where the issue is relevant. See *Hilton v. Guyot*, 159 U.S. 113, 210, 228 (1895); *Title Ins. & Trust Co. v. California Development Co.*, 171 Cal. 173, 152 Pac. 542 (1915); *Fisher, Brown & Co. v. Fielding*, *supra* note 94; *Long v. Hammond*, 40 Me. 204 (1855); *Goldstein v. Goldstein*, *supra* note 92. *But see* *Stewart v. Warner*, *supra* note 92; *Ambler v. Whipple*, 139 Ill. 311, 28 N.E. 841 (1891).

¹²³ See *Goldstein v. Goldstein*, *supra* note 92. A variation on this type of defense occurs when plaintiff procures a power of attorney from defendant by fraud and uses it to enter a personal appearance for defendant in the foreign action. See *State v. De Meo*, 20 N.J. 1, 118 A.2d 1 (1955).

¹²⁴ *May v. Roberts*, 133 Ore. 643, 286 Pac. 546 (1930).

raised is clearly a strong one, having much in common with the defense of inadequate notice or inadequate opportunity to be heard. It should clearly prevail in any case where facts to support it can be established, and where the fraud practiced by the successful party is clearly extrinsic, it might well be regarded simply as an independent defense.

It will be noted, however, that the defense of fraud as thus conceived depends wholly upon establishing the extrinsic nature of the fraud. The danger of hitching the validity of the defense to a definition of "extrinsic" is that this is precisely the mechanical kind of conceptualism which may depart in practice from underlying reason and policy. Consider, for example, a foreign judgment rendered after litigation on the merits. After its rendition the party against whom judgment was rendered discovers that the successful party had suborned the perjury of several witnesses who testified. May recognition or enforcement of the judgment in another forum be prevented by showing this fact? If the case is decided by reference solely to the definition of "extrinsic," it is quite likely that the defense will be denied.¹²⁵ The foreign court passed upon the credibility of the witnesses. Indeed it may have rejected their testimony entirely and decided the case on wholly different grounds.

It must be conceded on such facts that the independent policy in favor of the defense of extrinsic fraud is seriously weakened, and that the full force of the *res judicata* rationale might well outweigh it. The real point at issue, however, is whether the *res judicata* rationale operates at full force. It seems safe to assume that a court of any civilized country, confronted with a showing that such perjury had occurred, should reopen its own judgment and should at least re-examine the merits sufficiently to determine whether the perjured testimony had influenced the decision.¹²⁶ If this assumption is well-founded, then the defense of fraud is still a strong one. It rests not only on the independent policy of fairness, but strikes also at the *res judicata* rationale, weakening that rationale in much the same way as the dependent defense of lack of finality.¹²⁷

A similar argument can be advanced for the defense of mistake of fact or law. It is clear, in other words, that such mistake may, but does

¹²⁵ Cf. *Harrison v. Triplex Gold Mines Ltd.*, *supra* note 94. But cf. *Tremblay v. Aetna Life Ins. Co.*, *supra* note 92.

¹²⁶ Restatement, Judgments §§ 63, 121 (1942) Cf. *Zivilprozessordnung* § 580 (Germany 1950).

¹²⁷ See text accompanying note 110 *supra*. Cf. *Perkins v. Guaranty Trust Co.*, 274 N.Y. 250, 8 N.E.2d 849 (1937). See also *Perkins v. De Witt*, 197 Misc. 369, 94 N.Y.S.2d 177 (Sup. Ct. 1959), *aff'd in part, reversed in part*, 279 App. Div. 903, 111 N.Y.S.2d 752 (1952).

not necessarily, strike at the basic propriety of the foreign judgment. Its independent policy basis is therefore weaker than the typical independent defense, and it must rely on a simultaneous attack on the *res judicata* rationale. The problem here, however, is that it becomes impossible to presume that the foreign court would reopen its own judgment in order to consider such a mistake, since the matter is presumably one on which the foreign court has already passed. In the absence of such a presumption, the supplementary policies of the recognition rationale are not weakened and the force of the litigation-ending policy is at best only slightly diminished. A working hypothesis formulated to meet this problem might be: The defense of mistake of law or fact is relatively weak unless the party raising it can establish that the mistake is of such nature that the court of the judgment forum would reopen its own judgment on this ground.

Quite aside from these considerations, the mistake defense seems to have fallen into disrepute in the American courts for fear that, if allowed as a defense, the effect of any foreign judgment could be defeated simply by alleging that a mistake had been made.¹²⁸ The danger thus foreseen is that the party objecting to consideration of the foreign judgment would be permitted to go into the whole merits of the foreign cause in order to prove the alleged mistake. This argument seems to be only partly valid. It obviously has no application to mistakes which are apparent on the face of the foreign record.¹²⁹ It certainly has less validity with respect to mistake of law, particularly law of the recognition forum, than to mistake of fact.¹³⁰ The argument does point up a matter relevant to all of the defenses, however. Under no circumstances

¹²⁸ See *Dunstan v. Higgins*, *supra* note 93. See also Story, *Conflict of Laws* § 608, at 830 (Bigelow 8th ed. 1883). But see *Bank of China, Japan & The Straits v. Morse*, 44 App. Div. 435, 61 N.Y. Supp. 268 (1899). This argument has much in common with Story's criticism of the *prima facie* evidence rule that it "... would be a mere delusion, if the defendant might still question it [the foreign judgment] by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial." Story, *supra* at 829.

¹²⁹ See Story, *op. cit. supra* note 128, at 829.

¹³⁰ See Reese, "The Status in This Country of Judgments Rendered Abroad," 50 Colum. L. Rev. 783, 785 (1950). Even if the mistake was as to the law of the recognition forum, however, if the party now urging the mistake had the opportunity to prove that law in the judgment forum and chose not to do so, the foreign judgment cannot be impeached on the ground of mistake. *MacDonald v. Grand Trunk Ry. Co.*, 71 N.H. 448, 52 Atl. 982 (1902). The defense is obviously very weak if the alleged mistake was as to the law of the judgment forum. *Martinez v. Gutierrez*, 66 S.W.2d 678 (Tex. Comm. App. 1933). A mistake as to the law of a third country would seem to be a rather weak defense in any case where the party complaining of the mistake had an opportunity to prove the foreign law to the (other) foreign court. But cf. *Bata v. Hill*, 139 A.2d 159, 182 (Del. Ch. 1958), *aff'd sub. nom.*, *Bata v. Bata*, 163 A.2d 493 (Del. 1960).

should the mere allegation of a defense permit a complete re-examination of the merits on the pretense that this is merely proof of the defense.¹³¹ It would seem desirable to provide for some form of preliminary hearing on such defenses, in which the taking of evidence is restricted to matters relevant to the validity of the defense.¹³²

CONCLUSION

The effect of judgments, both sister-state and foreign, has achieved somewhat greater stability than many of its companion subjects in the conflict of laws. Some of the arguments made herein have suggested that this stability has been achieved by the development of more or less mechanical rules. The approach here proposed might well reduce to some degree the certainty and predictability of results in this field, but this is a price which must almost inevitably be paid if a subject is to be developed along policy lines. In a complicated policy area like that of foreign judgments, it seems doubtful if any fixed set of rules can implement underlying policy except with the grossest sort of approximation. The alternative suggested here is that rules, as such, should be constructed only for the clearest aspects of the problem. Beyond that, actual decision of cases should employ mere working hypotheses amounting to little more than presumptions. This approach would invite recognition and articulation of new policy arguments at every point of conflict and uncertainty.

The approach taken here frankly and unashamedly favors the recognition and enforcement of foreign judgments, not from any preconception that this should be done, but because the policies in favor of that result seem to the writer to be very potent. This view seems to be well-supported by most of the American cases, although the policies in question have been more often felt than expressed. It seems to the writer that these policies are best served by requiring defenses to establish themselves on a case-to-case basis, either by showing an independent and overriding policy or by showing that on the particular facts the rationale for recognition does not apply.

Use of the *res judicata* concept as a framework for this approach must be regarded as an advance toward the articulation of underlying policy, both for and against recognition. Because of the relatively unified nature of the *res judicata* doctrine at the domestic level, however, care must be taken not to ignore new policies which intrude when the doctrine is projected to the foreign-judgments level.

¹³¹ *Ritchie v. McMullen*, 159 U.S. 235, 242-43 (1895).

¹³² Perhaps the summary judgment procedure used in this country with some success in respect to sister-state judgments can be adapted to this problem area also. See Comment, 34 *Rocky Mt. L. Rev.* 490, 504 (1962).

The present article has not pretended to exhaust the relevant policies, or even exhaustively to discuss the issues which have been raised. Its purpose has been only to survey the existing theory, to sketch the outlines of a policy-oriented approach, and to suggest a few working hypotheses for use in dealing with problems of policy measurement and classification. The matters it leaves virtually untouched are at least as important as those which have been considered. Among these may be mentioned: (1) The question of what constitutes "adjudication" or a foreign "court" and why these should be the magic words which bring the policies of conclusiveness into play; (2) The desirability, or otherwise, of using foreign law to measure the scope and effect of foreign judgments;¹³³ (3) The relationship, if any, between jurisdiction and choice of law; (4) The effect on foreign judgments of shifting concepts of jurisdiction within the United States; (5) Working hypotheses which might be helpful in deciding cases where several defenses are raised in combination;¹³⁴ (6) The special policy problems which present themselves with respect to the doctrine of collateral estoppel. These matters, and no doubt others beyond the insight of the present writer, must be investigated before a reappraisal of the foreign-judgments problem can be considered complete.

¹³³ The author is presently engaged in a study of the recognition and enforcement of judgments under German law, and hopes to publish a report of his findings in late 1963 or early 1964.

¹³⁴ A related problem is the cancellation of the effect of one defense by the non-existence of another. The holding of the New York courts is that participation of both parties in procuring a Mexican divorce decree, coupled with actual appearance in Mexico, precludes a collateral attack on the Mexican decree even though it was rendered without subject-matter jurisdiction. In effect this rule permits the parties to confer jurisdiction of the subject matter by personal appearance, even though the issue of jurisdiction is never actually litigated. This extension of the opportunity-to-litigate theory of *Cook v. Cook*, 342 U.S. 126 (1951), from the sister-state to the foreign judgments level surely deserves further consideration. The New York cases are collected in Note, 17 N.Y.U. *Intra. L. Rev.* 239 (1961). *But cf.* *Golden v. Golden*, 41 N.M. 356, 68 P.2d 928 (1937).